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In the Supreme Court of the United States

OCTOBER TERM [redacted] 1963

No. 212

MORRIS RAPOPORT,
Defendant-Appellant,

against

STATE OF OHIO,
Plaintiff-Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8847

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(A) REP[ORTS OF THE OPINIONS IN THE COURTS BELOW.] JURISDICTIONAL STATEMENT.

The [opinion of the Supreme Court of the State of] Ohio in th[is case is reported in 174 Ohio St. 134, and 186] N. E. 2d 8[40, and is set forth in full in Appendix A. The] opinion of [the Court of Appeals for Lorain County, State] of Ohio, is[not reported. It is set forth in full in Appendix] B.

(B) THE[HE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES] THIS [IS INVOKED.]

IS I[N] Appellant was convicted under Section 3773.24 Revised Code of Ohio of the crime of suffering or

(i) A[ing a building or place to be opened for the trans-] of the Rev[f business on Sunday, June 18, 1961.] permitting action of b

The appellant was sentenced to pay a fine of Twenty-Five Dollars ($25.00) and costs. Sentence has been stayed pending this appeal.

(ii) The judgment sought to be reviewed is the judgment of the Supreme Court of the State of Ohio, entered December 19, 1962, which dismissed appellant's appeal, thereby affirming appellant's conviction of suffering or permitting a building or place to be opened for the transaction of business on Sunday. The judgment of the Supreme Court of the State of Ohio is set forth in Appendix A. The Notice of Appeal was filed March 19, 1963 in the Supreme Court of the State of Ohio. On May 13, 1963, the time for docketing of the within case in this Court was extended to June 17, 1963 by the Supreme Court of the State of Ohio. The entry of the Supreme Court of the State of Ohio extending such additional period is set forth in Appendix C.

(iii) Jurisdiction of this appeal is conferred on this Court by Title 28 of the U. S. Code Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court include *Winters v. New York*, 333 U. S. 507.

(v) The validity of Section 3773.24 of the Revised Code of the State of Ohio is involved. The statute makes it a crime for any person to suffer or permit a building or place to be open for the transaction of business on Sunday, but excepts from the operation of the statute "works of necessity" and various other sales and services including those incident to traveling, recreation, sports, amusements, entertainment and exhibitions. The text of Section 3773.24 is set forth in Appendix D.

(C) THE QUESTION PRESENTED BY THE APPEAL.

Whether the exceptions contained in Section 3773.24 of the Revised Code of the State of Ohio (which provides for punishment as a crime the suffering or permitting a building or place to be open for transaction of business * * * on Sunday") excluding from its operation "works of necessity" and the following:

> "(A) Traveling or the providing of services and commodities incidental thereto;
>
> (B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;"

render Section 3773.24 of the Revised Code of the State of Ohio, void, for the reason that said exceptions are so vague and indefinite that they fail to give adequate notice of the conduct proscribed by Section 3773.24 in violation of the Fourteenth Amendment to the United States Constitution.

(D) THE MATERIAL FACTS OF THE CASE.

Appellant was charged upon an Affidavit filed in the Municipal Court of Elyria, Ohio with suffering or permitting a building or place to be opened for the transaction of business on Sunday. Trial on the aforesaid charges commenced on July 13, 1961 and continued for three days through July 17, 1961.

At the outset of the trial, the federal question sought to be reviewed was raised on the argument of defendant's Motion To Dismiss the charge for the reason that Section 3773.24, was violative of the Fourteenth Amendment to the United States Constitution. At appropriate times throughout the trial, appellant renewed his Motion To Dismiss, and, upon each occasion the Motion was denied.

(E) THE QUESTION PRESENTED IS SUBSTANTIAL.

This appeal presents a constitutional question substantial in character. The Constitution of the United States requires that a criminal statute shall contain standards that are sufficiently definite to apprise those who are subject to the penalties of the statute of the conduct which it proscribes.

> "The standard of certainty in statutes punishing for (criminal) offenses is higher than those depending primarily upon civil sanctions for enforcement. The crime 'must be defined with appropriate definiteness * * *.' There must be ascertainable standards of guilt. One of common intelligence cannot be required to guess at the meaning of the enactment. * * *." *Winters v. New York,* 333 U. S. 507.

The words "recreation," "amusement" and "entertainment" contained in Sub-Section (B) of Section 3773.24 of the Revised Code of the State of Ohio have no static meaning or uniform definition. Rather obviously, that which might be termed common labor as applied to a farmer in Ohio's rural areas might well be considered recreation, amusement or entertainment to a city dweller who is occupied six days a week by performing services in an office. Further, the meaning of the word "recreation" is certainly one that varies from time to time, and has no definition which would permit its use to be the basis for an exception to criminal liability.

All of the criticisms which may be applied with respect to the indefiniteness of the exceptions contained in Sub-Section (B) are equally applicable to the exception under the statute contained in Paragraph 2 thereof which excepts from its penalty provisions "works of necessity." Once again, the term "necessity" has no static meaning, but varies according to the time and place to which it is

applied. Further, it is not clear by whose standard the so-called "works of necessity" must be judged. Is it sufficient to exculpate one from the imposition of penalties under the statute that he reasonably believes his work to be a necessity? Or, is it necessary that the one who benefits from his work reasonably believes that such work is a necessity? Or, is the application of the term "necessity" to be left to a jury or to the court for ad hoc determination? If the latter is true, then the word "necessity" is not one upon which a standard of conduct can be reasonably adjudged for the imposition of criminal sanctions.

This case is submitted on review without a transcript of testimony in order that a determination of the constitutionality of the statute to which objection is made can be tested against the requirements of the Fourteenth Amendment to the Constitution of the United States. The question of vagueness of such a statute is of the utmost importance. At this time when many states are in the process of enacting so-called Sunday closing laws, or in reenacting such statutes in modified form, the question of the constitutional validity of such statutes is a pressing problem in view of their application to countless business entities in the great majority of states. The severity or lack of severity of the penalties prescribed by such statutes does not, of course, affect the substantial question presented hereby, for, if unconstitutional, the result of the enactment of such statutes results in a substantial deprivation of liberty and property to those who are subject to their application.

Respectfully submitted,

BERNARD R. HOLLANDER,

Attorney for Appellant.

June 13, 1963.

APPENDIX A.

Opinion and Judgment of the Supreme Court of Ohio.

THE STATE OF OHIO, APPELLEE *v.* RAPOPORT, APPELLANT.

(No. 37775—Decided December 19, 1962.)

APPEAL from the Court of Appeals for Lorain County.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, COLLIER, O'NEILL and GRIFFTH, JJ., concur.

COLLIER, J., of the Fourth Appellate District, sitting by designation in the place and stead of HERBERT, J.

APPENDIX B.

Opinion of the Court of Appeals of Lorain County, Ohio.

Decided June 6, 1962.

HUNSICKER, *J.*

The appellant, Morris Rappoport, was convicted in the Elyria Municipal Court of the offense of suffering or permitting a building or place to be opened for the transaction of business on Sunday, in violation of Sec. 3773.24, R. C. The violation is alleged to have been committed in North Ridgeville, Lorain County, Ohio.

No bill of exceptions has been filed in this cause, although there was a trial of three days duration.

The appellant claims that the Sunday closing law is unconstitutional, being in violation of the Constitution of the State of Ohio, and the Constitution of the United States.

The appellant has presented a lengthy and interesting brief on the claim of unconstitutionality of the statute, Sec. 3773.24, R. C. This court, in the unreported case of *State of Ohio v. Gilfether*, Lorain County Court of Appeals case No. 1534, decided January 10, 1962, said:

> "There can be no question but that the statute is a constitutional and enforceable enactment of the Legislature of Ohio."

The statement contained in that case follows the pronouncement of the Supreme Court of Ohio in *State of Ohio v. Kidd*, 167 O. S. 521; and although the statute involved in that case was amended effective July 17, 1959, nevertheless, we believe the reasoning in the case of *State v. Kidd*, *supra*, as to constitutionality of this type of legislation, to be equally applicable herein.

The Supreme Court of the United States, in several cases arising before that tribunal in 1961, determined the constitutionality of the Sunday closing laws of states other than Ohio. The reasoning in such cases applies herein. *McGowan v. Maryland*, 81 S. Ct. 1101, 6 L. Ed. 2d 393; *Gallagher v. Crown Kosher Market*, 366 U. S. 617, 6 L. Ed. 2d 536; *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 6 L. Ed. 2d 551; *Braunfeld v. Brown*, 6 L. Ed. 2d 563.

The judgment of conviction herein must be affirmed. Judgment affirmed.

STEVENS, *P. J.*, and DOYLE, *J.*, concur.

APPENDIX C.

Order of the Supreme Court of Ohio Extending Time for Docketing.

On written request of counsel for appellant and for good cause shown, it is ordered that the time for docketing this case in the Supreme Court of the United States is extended to June 17, 1963.

KINGSLEY TAFT,
Chief Justice.

APPENDIX D.

Statute Involved.

SECTION 3773.24—Transaction of business on Sunday; exceptions.

No person, firm or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.

This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.

This section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionnaire, exhibitor, or employee of all or any of them, or any other persons, or the providing of services and commodities incidental thereto.